NO. 84-252

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ANN SHAVERS,

Petitioner,

v.

WALTER E. HELLER & COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

Respondent in its Brief in Opposition and in a separate accompanying "Respondent's Motion for Award of Damages -- Frivolity" has leveled charges that petitioner has misrepresented the

posture of this case and that the Petition is frivolous. These are serious charges and strong accusations. In its zeal, respondent has made a grave error. Petitioner is compelled to rebuke respondent in the most blunt and abrupt fashion before this Court, as is appropriate on this occasion.

Specifically, respondent argues throughout its Brief in Opposition that the central issue of this appeal, the finality of the judgment of the district court, was not appealed to the court of appeals and therefore was not properly before that court or this Court. Respondent argues that petitioner's decision to attack the Two and One-half Million Dollar default judgment against her by a motion to vacate under Rule 60(b) of the Federal Rules of Civil Procedure and her election to not file a notice of appeal within 30 days of the entry of the "judgment" in

question, which had been certified as "final" under Rule 54(b), therefore closed the door to appellate review of the finality of the "judgment" forever.

Respondent assumes throughout its Brief in Opposition that appeal of the judgment on its merits is the only mechanism whereby improper Rule 54(b) certification may be challenged. The gravity of this error is enormous. This Court in Sears, Roebuck & Company v. Mackey, 351 U.S. 427, 76 S. Ct. 895, 100 L. Ed. 1297 (1956), stated that a court of appeals could, indeed, review an abuse of a district court's discretion under Rule 54(b), but did not specify how or by what mechanism review was to be done. Left to their respective devices, the courts of appeals have recognized at least four (4) separate and independent means for accomplishing this review in the exercise

of their inherent right to examine finality issues and accordingly, their own appellate jurisdiction which may not be created or waived by agreement of the parties or by improper certification of the court. Bluntly stated, direct appeal of the judgment is but one of those four (4) ways. The other three are: mandamus of the district court, total disregard of the improperly certified "judgment" with impunity until the interlocutory matter does become final by completion of the case on its merits, and finally the express method used in this appeal, motion for relief from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Respondent did not advise this Court, in bringing its allegations of frivolity and misrepresentation that three separate courts of appeals have recognized these alternative avenues for challenging

finality of otherwise interlocutory matters. Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66 (2d Cir. 1973); Page v. Preisser, 585 F.2d 336 (8th Cir. 1978); Wheeler Machinery v. Mountain States Mineral, etc., 696 F.2d 787 (10th Cir. 1983). Nor did respondent advise this Court that no circuit has expressly held that appeal of the judgment on its merits is the only review mechanism for challenging finality of a matter certified under Rule 54(b). In fact, it does not appear that this Court has previously denied certiorari in any of the cases in which these alternative appellate vehicles were utilized, a point which is of significance only in the sense that the question appears to be one of first impression for this Court and one quite appropriate as a basis for granting certiorari either as an

included component of petitioner's questions presented for review, or as an independent question. With slight rephrasing, respondent's first question presented for review would be a very desirable issue to resolve by this Court. The question might be put as follows: May an otherwise interlocutory matter certified under Rule 54(b) of the Federal Rules of Civil Procedure be appealed under Rule 60(b) of the Federal Rules of Civil Procedure for the purpose of challenging finality where there has been no appeal of the "judgment" on its merits and more than 30 days has transpired?

Petitioner is appalled at the accusations leveled against her of misrepresentation and frivolity and amazed at respondent's oversight, at the very least, of the decisional law on this issue. Even so, petitioner thanks the respondent for giving this Court the opportunity to

address an issue of first impression for this Court. Further, respondent urges that even if it is wrong with respect to the jurisdictional issue, respondent would have this Court believe that the judgment was final. Respondent does not seriously challenge Frow v. De La Vega, 15 Wall. 552, 82 U.S. 552, 21 L. Ed. 60 (1872), and its progeny, but rather seeks to distinguish this case from the time-honored rule that default judgments in fraud and conspiracy cases should not be entered against a single defendant when the liability and damages with respect to remaining defendants has not been fixed. However, respondent does not explain the obvious incongruous results which would occur, particularly with respect to damages, from a determination after a trial on the merits that other defendants engaging in the same conduct alleged as to the plaintiff are held not

liable, or if damages are not actually proved from the facts to be the same, or subject to trebling to such astronomical proportions. Respondent is not heard at all to dispute those cases, including one from this Court, extending the Frow rule beyond joint liability to include cases where there are closely related defenses. Cuebas y Arrendondo v. Cuebas y Arrendondo, 223 U.S. 376, 32 S. Ct. 277, 56 L. Ed. 476 (1912). Nor does respondent undertake to explain how, under the allegations of the Complaint, the alleged fraud could have resulted in damage to respondent from the conduct of petitioner, Mrs. Shavers, acting alone and not in concert with others.

CONCLUSION

Despite respondent's efforts to keep this Court from examining its own jurisdiction and that of the court of appeals, jurisdiction cannot be waived

or conferred by consent and ought to be considered by the Court sua sponte regardless of the manner in which it arrives before the Court, be it by Rule 60(b) motion, direct appeal, mandamus, or delayed appeal in which a Rule 54(b) certificate is ignored until the case becomes final as to all parties and claims. Courts of appeals decertify improperly certified "judgments" regardless of the manner in which the case gets to the Court. The issue is not how the appeal arises, but rather whether the judgment is final. If the judgment is not, the Court must decertify and dismiss even if the parties are ignorant of the defect and are both urging the Court to consider the appeal on its merits. Spencer, White & Prentis, Inc. v. Pfizer, Inc., 498 F.2d 358 (2d Cir. 1974).

In the instant case, nothing more

than an entry of default against Mrs. Shavers was appropriate. To enter any "judgment" against her prior to a determination of the case on its merits as to the remaining defendants in this fraud and conspiracy case clearly violated Frow and its progeny. Any of the four methods mentioned by the Second, Eighth, and Tenth Circuits, if properly acted upon by the courts of appeals, will result in decertification of an improperly certified interlocutory matter. If all that is sought to be accomplished is decertification, the vehicle chosen is irrelevant. Only where other issues become involved, such as an attempt to review the underlying judgment itself, which has not been done in this case, does the method of appeal matter. Mandamus, it would seem, would serve decertification alone. Direct appeal, if the judgment is not truly "final," would decertify the issue but not reach

the merits. A delayed appeal, ignoring erroneous certification until the case is ultimately resolved on its merits as to all parties and issues, would give the Court authority to pierce the improper certification and consider all issues, including post-judgment motions and the merits. A Rule 60(b) motion would permit review of the district court's discretion in not granting relief from the judgment, and would bring the decertification issue before the Court as well.

Respondent says that the decertification issue should have been presented by a method not chosen by Mrs. Shavers. One is reminded of the eloquence of the great American poet, Robert Frost, regarding the selection of alternatives. He said:

> The Road Not Taken
>
> Two roads diverged in a yellow wood,
> And sorry I could not travel both

> And be one traveler, long I stood
> And looked down one as far as I could
> To where it bent in the undergrowth;
>
> Then took the other, as just as fair,
> And having perhaps the better claim,
> Because it was grassy and wanted wear;
> Though as for that the passing there
> Had worn them really about the same,
>
> And both that morning equally lay
> In leaves no step had trodden black.
> Oh, I kept the first for another day!
> Yet knowing how way leads on to way,
> I doubted if I should ever come back.
>
> I shall be telling this with a sigh
> Somewhere ages and ages hence:
> Two roads diverged in a wood, and I--
> I took the one less traveled by,
> And that has made all the difference.

Robert Frost, "The Road Not Taken," in Louis Untermeyer (ed.), The Road Not Taken, An Introduction to Robert Frost, Holt, Rinehart and Winston, New York, 1971, pp. 270-71.

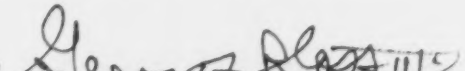
One may speculate as to the result had Mrs. Shavers pursued one of the roads not taken, such as direct review, mandamus, or deliberate delay until final resolution of the litigation. However, she chose a somewhat less traveled route which has indeed made all the difference, because

the issues which gave her immediate concern were properly addressable by Rule 60(b), and particularly the inequities and unjustness raised in her motion to vacate (Appendix G, p. 23-24) which are consistent with Rule 60(b)(6) and her consistent position on appeal that the judgment was improperly certified as final because it is unjust and inequitable to permit a final judgment to be entered against one defaulting defendant in a multiple defendant fraud and conspiracy case where the remaining defendants contest liability and the action remains pending. Rule 60(b)(6) was the express appellate mechanism used to decertify the improperly certified Rule 54(b) motion in Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 71-72 (2d Cir. 1973). Mrs. Shavers took the better road and either the petition for certiorari should be granted and upon the

merits this Court should direct dismissal of the appeal for the express purpose of decertifying the judgment below as final, or if this Court dismisses the appeal, the dismissal should be predicated upon the court of appeals' lack of jurisdiction to consider a matter which is not final, thereby also decertifying the "judgment."

Respectfully submitted,

ANN SHAVERS, Petitioner

BY: 
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CERTIFICATE OF SERVICE

I, GEORGE F. BLOSS, III, counsel for petitioner, do hereby certify that I have deposited in the United States Post Office three (3) true and correct copies of the foregoing Reply Brief of Petitioner, with first class postage prepaid, addressed to MARGARET L. VANDERVALK, Esq., of the firm of Akin, Gump, Strauss, Hauer & Feld, Attorneys of record for respondent, at their record mailing address of 2800 Republic Bank Dallas Building, Dallas, Texas 75201, being the only party required to be served, on this, the 23rd day of OCTOBER, A.D. 1984.

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